INTRODUCTION

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The "arising out of employment" requirement of Section 2(2) is a separate issue from the Section 3(c) "willful intention to injure" inquiry. Thus, even if an injury has arisen out of and in the course of employment, it is not compensable if the injury was occasioned by the willful intention of the employee to injure himself. The Section 20(a) presumption applies to the Section 2(2) requirement that the injury arose out of claimant's employment, and the Section 20(d) presumption complements the Section 3(c) inquiry. *Jackson v. Strachan Shipping Co.,* 32 BRBS 71 (1998)(Smith, J., concurring & dissenting).

Establishing Injury

The Section 13(b)(2) expanded statute of limitations for occupational diseases does not apply to a claim for injury due to chronic synovitis - an arthritic ailment - as there is no evidence that claimant's employment caused his pre-existing arthritic condition or that synovitis is an inherent hazard to persons in employment similar to claimant. Accordingly, the claim was barred by Section 13. The Board noted that an injury may occur over a gradual period of employment and still be construed as accidental. As medicals are never time-barred, the Board reversed the administrative law judge's decision that causation was not established, noting that he erred in requiring evidence establishing a causal link between claimant's synovitis and his employment and that there was no evidence rebutting Section 20(a). Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989).

The Second Circuit affirmed the Board's holding that synovitis is not an occupational disease, as there is no evidence in this case that the "hazardous conditions" of claimant's employment are peculiar to his employment as a maintenance man. The court expresses no opinion as to whether a repetitive motion can be a "hazardous condition." Gencarelle v. General Dynamics Corp., 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989), aff'g 22 BRBS 170 (1989).

Chest pains constitute an "injury" within the meaning of the Act. An injury may occur gradually as a result of continuing exposure to conditions of employment. Aggravation of a pre-existing condition is an injury. Care v. Washington Metropolitan Area Transit Authority, 21 BRBS 248 (1988).

In a heart-attack case, the Board remanded for the administrative law judge to make explicit findings on whether claimant suffered a myocardial infarction and reiterated that chest pains can constitute an injury under the Act; thus, even if claimant did not have a myocardial infarction, he may nonetheless be compensated for work-related chest pains. The Board discussed U.S. Industries/ Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982), noting that the Court did not hold that pain is not a compensable injury or that claimant must prove an injury arising out of and in the course of employment without benefit of the Section 20(a) presumption, but that the Court held simply that a prima facie claim must at least allege an injury that arises in the course of employment as well as out of employment. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

Chest pains constitute an injury within the meaning of the Act; U.S. Industries does not stand for the proposition that pain alone is not an injury. Obert v. John T. Clark and Son of Maryland, 23 BRBS 157 (1990).

Board reverses administrative law judge's finding that claimant did not suffer an injury under the Act. The administrative law judge erred in requiring that claimant not only establish that he suffered from "the wound or physical harm but . . . the consequence or disability that results therefrom," and that "the injury must produce some damage, i.e., harm or impairment, loss of use or function in some measurable or appreciable degree." Claimant need not show that he has a specific illness or disease in order to establish an injury, but need only establish some physical harm. As the record indicated claimant suffered from a physical harm, pleural plaques, he therefore established that something had gone wrong within his frame. The Section 20(a) presumption was therefore invoked. Romeike v. Kaiser Shipyards, 22 BRBS 57 (1989).

The Second Circuit remands the case to the Board for consideration of whether claimant sustained an injury under the Act, where the doctor credited by the administrative law judge stated claimant had pleural thickening and calcification. The court cited the Board's decision in Romeike, 22 BRBS 57 (1989), a case with similar facts, wherein the Board noted that claimant need not show he has a specific illness or disease in order to establish he has suffered an injury under the Act, but need only establish some physical harm, i.e., that something has gone wrong with the human frame. Crawford v. Director, OWCP, 932 F.2d 152, 24 BRBS 123 (CRT) (2d Cir. 1991).

The Board reverses the administrative law judge's finding that the work-related aggravation of claimant's lumbar stenosis constitutes an occupational disease, and holds that claimant sustained a gradual work-related accidental injury. The evidence establishes that the stenosis was aggravated by the walking and standing required by claimant's employment. As these conditions are not peculiar to claimant's employment and as there is no evidence that others in employment similar to claimant's develop lumbar stenosis, the condition is not an occupational disease. Claimant thus is not entitled to the expanded statute of limitations. Steed v. Container Stevedoring Co., 25 BRBS 210 (1991).

Establishing Accident or Working Conditions

Where claimant injured his back while undergoing vocational testing in connection with his work-related arm injury, his back injury necessarily arises out of and in the course of employment. Mattera v. M/V Mary Antoinette, Pacific King, Inc., 20 BRBS 43 (1987).

A psychological injury resulting from a legitimate personnel action, as the reduction-in-force in this case, is not a working condition which can form the basis for a compensable injury under the Act. However, because claimant argued al alternative working condition which would have caused the harm alleged, the case was remanded for the administrative law judge to consider whether claimant's psychological injury was the product of cumulative stress from the job. Marino v. Navy Exchange, 20 BRBS 166 (1988).

The Board affirms administrative law judge's reliance on the absence of direct impeaching evidence, the corroborating testimony of a co-worker, and claimant's direct testimony to find a work-related accident occurred. Scott v. Tug Mate, Inc., 22 BRBS 164 (1989).

Claimant is not required to show that his working conditions were unusually stressful in order to establish working conditions sufficient to invoke Section 20(a). Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

The Board affirmed the administrative law judge's conclusion that claimant failed to establish his prima facie case where his conclusion that claimant failed to establish the working conditions that he alleged caused his harm was supported by substantial evidence. Claimant had argued that his job as a labor relations assistant was a high pressure job, that he had been threatened on the job and that his job was extremely stressful. The Board rejected claimant's and Director's arguments that the administrative law judge erred in focusing on whether the workplace was dangerous or stressful beyond the norm, finding that the administrative law judge's decision was based not on an erroneous legal standard, but on factual findings indicating the conditions claimant alleged were not in fact present. Sanders v. Alabama Dry Dock and Shipbuilding Co., 22 BRBS 340 (1989), on remand from 841 F.2d 1085, 21 BRBS 18 (CRT)(11th Cir. 1988), rev'g 20 BRBS 104 (1987).

In a claim for death benefits where the employee committed suicide, the Board affirmed the administrative law judge's invocation of the Section 20(a) presumption as he properly found that the issue was the effect of the work-related stress on the employee and not whether the stress was "mild" in the abstract. Thus, the Board does not need to address whether a grand jury investigation involving co-workers is sufficient to establish the "working conditions" element. Konno v. Young Brothers, Ltd., 28 BRBS 57 (1994).

Administrative law judge rationally found that discrepancies in claimant's accounts of the

manner in which the accident occurred were "within the expected range" and insignificant. Administrative law judge's conclusion that claimant sustained an industrial injury to his back on December 27, 1982 is supported by the medical histories and claimant's testimony. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

The Board affirmed the administrative law judge's finding that claimant failed to establish the existence of a work-related accident on January 17, 1989, as alleged by claimant, which could have caused his present back condition. The administrative law judge noted inconsistencies in claimant's testimony regarding the date of the alleged work accident, and claimant's failure to report the incident to Dr. Grimes on January 19, 1989. As claimant failed to establish an essential element of his *prima facie* case, the Board affirmed the administrative law judge's denial of the claim. *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996).

In a case where it is undisputed that claimant has a work-related hearing loss involving two potentially responsible employers, the Ninth Circuit held that the administrative law judge erred in denying benefits because claimant did not establish injurious stimuli at the last employer. The court holds that claimant's testimony of exposure to injurious noise is sufficient to invoke the Section 20(a) presumption that working conditions existed at the last employer that could have caused his hearing loss. As employers failed to present rebuttal evidence, the presumption controls and the last employer is liable for claimant's work-related hearing loss. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

The Board affirms the administrative law judge's finding that claimant established the Aworking conditions@ element of his *prima facie* case as he rationally credited claimant's testimony that he engaged in lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds,* 206 F.3d 474, 34 BRBS 23 (CRT)(5th Cir. 2000).

In this psychological injury case, the Board held that the administrative law judge erred in holding that claimant was not entitled to the Section 20(a) presumption. In his analysis, the administrative law judge erred in considering whether employer's interactions with claimant, including claimant's treatment by her supervisor, were legitimate or justified. The Board held that under *Marino v. Navy Exchange*, 20 BRBS 166 (1988), the administrative law judge should have considered whether, irrespective of disciplinary and termination procedures, the cumulative stress in claimant's working conditions could have caused or aggravated her psychological injury. Since the record contained incidents of day-to-day working conditions, rather than personnel actions, that could have caused or aggravated claimant's psychological injury, the Board held that claimant established working conditions sufficient to demonstrate a *prima facie* case, and therefore was entitled to invocation of the Section 20(a) presumption. *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997)(McGranery, J., dissenting), *aff'd on recon. en banc,* 32 BRBS 134 (1998)(Brown and McGranery, JJ., dissenting).

The Board affirms the administrative law judge's finding that claimant established the working conditions element of his *prima facie* case, as he rationally credited claimant's testimony regarding the level of noise to which he was exposed over the contrary testimony of one of employer's witnesses. *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998).

The Board affirmed the administrative law judge's finding that claimant established the working conditions element of his *prima facie* case, as he rationally credited claimant's testimony regarding his stressful work environment. Moreover, the administrative law judge credited medical opinions that claimant suffered angina while working for employer, and that stress may cause such a cardiac event. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd,* 248 F.3d 54, 35 BRBS 41(CRT)(2d Cir. 2001).

The Board held that in order for the injury to decedent to be compensable, his exposure to asbestos must have occurred, at least in part, on a covered situs, that is, a covered portion of employer's facility. Thus, while it is neither necessary that the last exposure nor the majority of the exposure comes from the covered areas, *some* exposure must have occurred within a covered area for employer to be held liable. Where there is conflicting testimony as to whether decedent was exposed to asbestos while working on the covered portions of employer's facility, the case must be remanded for a determination by the administrative law judge of where decedent's injury occurred and, thus, whether the injury is compensable. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

The Board affirmed the administrative law judge's finding that the decedent had work-induced stress associated with unreasonable expectations for the vessel's completion and delivery based on the testimony of decedent's fellow employees and his family members. In addition, the administrative law judge found that decedent was required to work long hours and endure further stress associated with interference from the shipyard's superintendent. Work events need not be unusually strenuous to establish a compensable injury. *Bazor v. Boomtown Belle Casino,* 35 BRBS 121 (2001), *rev'd,* 313 F.3d 300, 36 BRBS 79(CRT)(5th Cir. 2002), *cert denied,* 124 S.Ct. 65 (2003).

Where claimant testified as to his job duties and that videotapes submitted by carrier do not accurately portray all aspects of his usual work as slingman, and a physician testified that claimant described his job duties to him, the Board affirmed the administrative law judge's finding that the testimony of claimant and the physician establish that claimant's working conditions could have caused or aggravated claimant's degenerative back condition. Therefore, claimant established a *prima facie* case for invocation of the Section 20(a) presumption. *Price v. Stevedoring Services of America,* 36 BRBS 56 (2002), *aff'd, vacated and remanded, and reversed on other grounds,* 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004) and No. 02-71207, WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *cert. denied,* 125 S.Ct. 1724 (2005).

The First Circuit affirmed the decision after remand, as substantial evidence supported the administrative law judge's decision that stressful working conditions could have aggravated claimant's pre-existing neurological condition. The administrative law judge found that claimant was teased incessantly about his medical condition which exacerbated claimant's condition. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

General Principles

Aggravation/Combination

Where employer contends that claimant's disability is due to a pre-injury history of repeated arm trauma and post-injury aggravation but does not contest the employment-related injury, his causation arguments fail. The Board reiterates its holding that if an employment-related injury contributes to, combines with or aggravates a pre-existing condition the entire resultant disability is compensable. Further, when claimant sustains a work injury which is followed by the occurrence of a subsequent injury outside work which is the natural or unavoidable result of the initial work injury, employer is still liable. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

Under the aggravation rule, if claimant's work played any role in the manifestation of his underlying arteriosclerosis, then the non-work-relatedness of the disease and the fact that his chest pains could have appeared anywhere are irrelevant--the entire resulting disability is compensable. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

The administrative law judge's finding that carrier was liable for the payment of compensation to claimant for his 1980 and 1983 injuries is correct as carrier was on the risk at the time of the 1983 injury, which combined with the effects of the 1980 injury to produce claimant's present disability. Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989).

Where claimant is unable to return to his usual work because of a combination of his work-related hernias and his underlying heart condition, his entire resulting disability is compensable. Marko v. Morris Boney Co., 23 BRBS 353 (1990).

Additional aggravation of a hearing loss which occurs after termination of covered longshore employment is not compensable. Thus, where claimant worked at a covered facility and transferred to a situs outside the scope of Section 3(a), any additional hearing loss sustained after the transfer is not compensable. Brown v. Bath Iron Works Corp., 22 BRBS 384 (1989).

In the case of a retiree with an occupational hearing loss whose covered employment is followed by a period of non-covered employment, the Board holds that Brown, 22 BRBS 384 (1989), does not require a claimant to recreate the precise extent of his hearing loss at the date his covered employment terminated. In light of the last covered employer rule, and in the absence of credible evidence regarding the extent of claimant's hearing loss at the time he leaves covered employment, the administrative law judge may rely on the most credible evidence in determining the extent of claimant's work-related loss. In this case, claimant left covered employment in 1963, and the administrative law judge rationally credited the results of a 1986 audiogram. Labbe v. Bath Iron Works Corp., 24 BRBS 159 (1990). See also Dubar v. Bath Iron Works Corp., 25 BRBS 5 (1991)(following Labbe for non-retirees-administrative law judge rationally credited 1988 audiogram where last covered employment was in 1971); Bruce v. Bath Iron Works Corp., 25 BRBS 157 (1991)(administrative law judge rationally denied benefits where claimant left covered employment in 1953 and he could not project results of equivocal 1968 audiogram back to 1953).

The aggravation rule does not permit a deduction from employer's liability in hearing loss cases for the effects of presbycusis. Ronne v. Jones Oregon Stevedoring Co., 22 BRBS 344 (1989), aff'd in pert. part and rev'd in part sub nom. Port of Portland v. Director, OWCP, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991).

The Ninth Circuit affirms the Board's holding that claimant is entitled to compensation for his entire hearing loss under the aggravation rule, without a deduction for the portion due to presbycusis. Port of Portland v. Director, OWCP, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), aff'g in pert. part and rev'g in part Ronne v. Jones Oregon Stevedoring Co., 22 BRBS 344 (1989).

When claimant sustains a second work-related injury, that injury need not be the primary factor in the resultant disability for compensation purposes. If the injury aggravates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. In this case, substantial evidence supports a finding of aggravation. Claimant was able to work until after the second injury with increased wages, and medical evidence supports a finding of a distinct aggravation. Lopez v. Southern Stevedores, 23 BRBS 295 (1990).

Employer is liable for benefits for claimant's carpal tunnel syndrome because it concedes a work-related aggravation of claimant's condition occurred. Alexander v. Ryan-Walsh Stevedoring Co. Inc., 23 BRBS 185 (1990), vacated and remanded mem., 927 F.2d 599 (5th Cir. 1991).

The Ninth Circuit rejects employer's argument that the aggravation rule should not apply to retired workers. The court holds that the rehabilitation of injured workers is only one purpose of the aggravation rule, and that, as the Act is to be liberally construed, the rule therefore applies to working and retired employees equally. The court also rejects employer's argument that the AMA Guides overrule the aggravation rule, and require that respiratory disabilities be apportioned between environmental causes and tobacco use. The court held that the Guides simply provide instructions on how an apportionment might be made, and further noted that the doctors relied upon by the administrative law judge were unable to determine what portion of claimant's disability was attributable solely to asbestos exposure and what portion was attributable to other causes. SAIF Corp./Oregon Ship v. Johnson, 908 F.2d 1434, 23 BRBS 113 (CRT) (9th Cir. 1990).

If claimant's work played any role in the manifestation of the disease, then the non-work-relatedness of the disease and the fact that the chest pains could have occurred anywhere are irrelevant; the entire resulting disability is compensable. Obert v. John T. Clark and Son of Maryland, 23 BRBS 157 (1990).

The Board rejected employer's contention that claimant's disability was not caused by his injury with the Redskins but was due instead to a temporary aggravation of a previous injury that occurred while claimant was playing college football. The Board noted that employer would not be relieved of liability because under the "aggravation rule," where an employment-related injury aggravates, accelerates, or combines with an underlying condition, employer remains liable for the entire resultant condition. In addition, the record is devoid of evidence supporting employer's position. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

As the unequivocal evidence of record establishes that the 100 percent hearing impairment of the left ear is solely the result of a non work-related subsequent intervening cause, the aggravation rule is not applicable. As claimant's right ear impairment measures zero percent under the AMA *Guides* and the left ear loss is not work-related, claimant is not entitled to disability compensation. *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

The Sixth Circuit affirms the finding that claimant is permanently totally disabled, and that employer is liable for medical benefits, as substantial evidence supports the finding that the work accident aggravated claimant's pre-existing conditions rendering him unable to perform alternate work, in combination with his poor education and low-average intelligence. *Morehead Marine Services, Inc. v. Washnock,* 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998).

The Fifth Circuit holds that the opinion of the treating physician that he could not determine how much of the prior condition and/or current injury contributed to claimant's permanent total disability, along with claimant's testimony that his present pain is greater than before the work injury, support a finding that claimant's current disability is due at least in part to the work injury. The only legally relevant question is whether the work injury is a cause of the disability, not whether it is the sole cause. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

Where claimant sustained a back injury in 1996 with one employer and a more serious Aflare-up@ in 1998 with another employer, who had taken over the first employer's facility, the Third Circuit held that the Board properly reversed the administrative law judge's determination that the first employer was liable for claimant's disability benefits. It stated that the administrative law judge's conclusion was not supported by substantial evidence where the record established that claimant's work in early 1998 aggravated his condition to the degree that even the administrative law judge acknowledged there was an aggravation. The court held that the Board properly determined that the administrative law judge erred in addressing whether the earlier injury was the Aprecipitant injury@ rather than ascertaining whether the subsequent work aggravated or exacerbated claimant's condition. Accordingly, the court affirmed the Board's determination that claimant's second employer is liable for claimant's benefits as a matter of law. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

Where claimant sustained a back injury in 1993 while working for employer, and suffered another injury to his back during an altercation with his supervisor for another employer in 1997, the Second Circuit affirmed the Board's determination that there was no substantial evidence to support the administrative law judge's finding that claimant had completely recovered from his first injury. First, the court stated that the evidence did not support a finding of a physical recovery, and second, it rejected employer's assertion that claimant was not economically disabled as a result of the first injury because he obtained a lighter duty job with a higher base wage and because his wage would decrease as his age increased. The court stated it was clear that each injury caused a wage-earning decrease to some degree, but it was unclear to what extent the earlier disability affected the current overall disability, and it remanded the case for such determination. *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003).

Natural Progression/Intervening Cause

Board reverses administrative law judge's finding that subsequent injury outside work was not related to initial work-related injury. Where claimant had been released by his doctors to return to his usual work, which involved heavy labor, the administrative law judge erred in finding that claimant's conduct in stepping into a pickup truck was negligent so as to sever the link between the subsequent injury and the employment. Since it was uncontested that claimant's condition due to his work injury led to his fall from the truck, the second injury was the natural and unavoidable result of the first and employer is liable for the entire disability and for medical expenses due to the second injury. Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987), aff'd mem., 901 F.2d 1112 (5th Cir. 1990).

The Board affirmed the administrative law judge's reliance on medical opinion relating claimant's subsequent injury to his initial work-related injury, relying on the rule that when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire resultant disability and for medical expenses due to both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. However, if the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for disability attributable to the intervening cause. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988).

The Board reversed the administrative law judge's finding that the work claimant performed after his 1976 injury constituted an intervening cause which led to claimant's 1984 surgery and additional disability where the only two medical reports of record both stated that the worsening of claimant's condition between his return to work in 1979 and his most recent surgery in 1984 were related to the original (1976) injury. Madrid v. Coast Marine Construction Co., 22 BRBS 148 (1989).

The possibility of an intervening cause does not affect invocation of the Section 20(a) presumption. Where a second non work-related injury follows a work-related injury, employer is liable for the entire resulting condition if the second injury was the natural and unavoidable consequence of the first; provided that even if the two injuries are related, employer can escape liability by showing that the second injury was caused by the negligence of claimant or a third party. Where claimant's second injury is the result of an intervening cause, employer is relieved of liability for that portion of disability attributable to the second injury. In this case, employer did not rebut the Section 20(a) presumption, and the second injury was properly held related to the initial work injury. James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

Employer is liable for benefits for claimant's carpal tunnel syndrome if the natural progression of his condition resulted in an increase of symptoms in January 1987, when claimant sought treatment, because employer does not dispute that the original carpal tunnel syndrome is work-related. Alexander v. Ryan-Walsh Stevedoring Co., 23 BRBS 185 (1990), vacated and remanded mem., 927 F.2d 599 (5th Cir. 1991).

The Board affirmed the administrative law judge's finding that claimant's disability was due to a supervening car accident, which was not the natural and unavoidable result of the initial work injury, as it was supported by substantial evidence. The Board rejected the contention that the Act requires employer to establish that the effects of the work injury are "overpowered and nullified" by the subsequent traumatic events in order the rebut the Section 20(a) presumption, noting that the Ninth Circuit has adopted the position in Cyr, 211 F.2d 454 (9th Cir. 1954), that a subsequent injury is compensable if it was the natural and unavoidable result of a compensable work injury. Wright v. Connelly-Pacific Co., 25 BRBS 161 (1991), aff'd mem. sub nom. Wright v. Director, OWCP, 8 F.3d 34 (9th Cir. 1993).

The Seventh Circuit held that aggravation of claimant's work-related back injury in subsequent employment as delivery man involving heavy lifting was not a supervening cause relieving employer of liability. Applying the Fifth Circuit's test, the court stated that the causal effect attributable to the work injury must not have been overpowered and nullified by non-employment-related influences. The court determined that claimant's action in seeking employment for which he was most qualified even if there might be a risk of aggravating an injury was easily foreseeable. Noting that Section 2(2)'s definition of "injury" uses "unavoidably" in the disjunctive with "naturally," the court ruled that claimant's aggravation of his symptoms was a "natural" if not "unavoidable" result of the work accident. Jones v. Director, OCWP, 977 F.2d 1106, 26 BRBS 64 (CRT) (7th Cir. 1992).

The Board rejects employer's contention that a fraud investigation culminating in a grand jury is an intervening cause of employee's suicide. In this case, the doctor credited by the administrative law judge diagnosed employee with depression arising out of the employment. Where there is a connection between the death and the employment, the causal effect attributable to the employment must not have been severed by an intervening cause originating entirely outside the employment. In this case, the grand jury investigation had its origins in the employment, and thus is not an intervening cause relieving employer of liability. Konno v. Young Brothers, Ltd., 28 BRBS 57 (1994).

Where claimant injured her back in 1986 while working for employer, and again in 1992 while working for a different, non-maritime, employer, the Board held that employer was liable for benefits because the evidence of record indicated that the current disability was caused by both injuries, and neither doctor credited by the administrative law judge attributed the current disability to the 1992 injury alone. Therefore, as the current disability was caused, at least in part, by the 1986 injury, and because there was no evidence which apportioned the disability between the two injuries, the Board affirmed the administrative law judge's finding that employer did not rebut the Section 20(a) presumption as well as his decision holding employer liable for the entire disability. *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997).

On *en banc* reconsideration in this case, the Board distinguished this case from several other subsequent injury/natural progression cases. It held that, while it is true claimant's 1992 herniation, which occurred subsequent to her covered employment, was not the natural result of her 1986 work-related back injury, employer is liable for benefits for claimant's entire 1992-1994 disability, as it was the result of the 1992 herniation as well as the natural progression of the chronic osteophytic and spondylitic changes claimant suffers because of her 1986 work injury. Further, because no doctor apportioned the disability between the two injuries, the Board reaffirmed the panel's conclusion that employer is liable for the entire disability. *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).

The Fifth Circuit declined to articulate which of its differing standards as to what constitutes a supervening cause is operative as the facts in the record do not meet either standard. In *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951), the court held that a supervening cause is an influence originating entirely outside of employment that overpowered and nullified the initial injury. In *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981), the court stated that a supervening cause is one that causes the condition to worsen. In this case, the administrative law judge rationally found no supervening cause and there is no evidence of intentional misconduct on claimant's part. *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1563 (1998).

The case law pertaining to intervening cause rests on an interpretation of the Section 2(2) term "or as naturally or unavoidably results from such accidental injury," and requires that an employee show a degree of due care in regard to his work injury and take reasonable precautions to guard against re-injury. The duty of care required of an employee to guard against a subsequent injury does not apply to the initial work injury; Section 4(b) of the Act eliminates negligence or fault as a consideration with respect to the work event which caused the primary injury. Thus, the Board, holding that the administrative law judge erroneously applied intervening cause case law in considering the cause of an initial work injury reversed the administrative law judge's finding that the Section 20(a) presumption was rebutted based on his finding that claimant's intentional misconduct was the cause of his injury. *Jackson v. Strachan Shipping Co.,* 32 BRBS 71 (1998)(Smith, J., concurring & dissenting).

The Fourth Circuit affirms the administrative law judge's finding that claimant's current back problems were the natural progression of his initial injury with employer, and that his subsequent employment did not give rise to a supervening cause, as supported by substantial evidence. The court noted that there was no second trauma, but, rather, an onset of complications from the first trauma. Stating that the "aggravation rule" is usually applied on behalf of claimants for the purpose of holding their current employer liable for benefits, the court declined to decide whether an employer may invoke the rule as a shield against liability; the court noted, however, that the Ninth Circuit approved the defensive use of the aggravation rule by employers in *Kelaita,* 799 F.2d 1308 (9th Cir. 1986). *Admiralty Coatings Corp. v. Emery,* 228 F.3d 513, 34 BRBS 91(CRT)(4th Cir. 2000).

The Board affirmed the administrative law judge's finding that claimant's work-related back condition had resolved by October 22, 1997, as the administrative law judge rationally found that any further back problems were attributable to a fight claimant was involved in on February 22, 1998. The Board notes that, in this case, this issue turns on weighing the evidence as a whole, and does not turn on application of the Section 20(a) presumption, as the evidence is sufficient to rebut the presumption. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.,* 32 Fed. Appx. 126 (5th Cir. 2002)(table).

The Board holds that a physician's treatment of a claimant's work injury, even if it was unnecessary and was the malpractice, does not sever the causal relationship between the injury and the employment. The treatment does not constitute an "intervening cause" because there is no evidence that the doctor's treatment was intentional misconduct or negligent conduct *unrelated* to the work injury. Moreover, if claimant's choice of physician and treatment are reasonable, claimant may receive disability benefits for any increased disability due to failed treatment. The Board therefore reverses the administrative law judge's finding that employer is not liable for disability benefits following surgery and remands the case. *Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988); *see also White v. Peterson Boatbuilding Co.,* 29 BRBS 1 (1995); *Mattera v. M/V Mary Antoinette, Pacific King, Inc*., 20 BRBS 43 (1987); *Weber v. Seattle Crescent Container Corp*., 19 BRBS 146 (1986).

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Claimant's mere presence on employer's parking lot at the time of her injury is insufficient to establish that her injury arose in the course of her employment if she was participating in an unsanctioned social activity at the time. In a footnote, the Board noted that the coming and going rule does not apply where claimant is on employer's premises. The case was remanded to reconsider whether claimant's social activities severed the link with her employment. Alston v. Safeway Stores, Inc., 19 BRBS 86 (1986).

Neck injury sustained during the course of medical examination scheduled at employer's request for work-related hearing loss claim is covered under the Act, as such an injury necessarily arises out of and in the course of employment. Remand for the administrative law judge to determine whether neck injury sustained during the course of medical treatment. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986).

Where claimant injured his back while undergoing vocational testing in connection with his work-related arm injury, his back injury necessarily arose out of and in the course of employment. Mattera v. M/V Mary Antoinette, Pacific King, Inc., 20 BRBS 43 (1987).

In an unpublished decision, the 4th Circuit affirmed the Board's decision in Bobier v. The Macke Co., 18 BRBS 135 (1986), aff'd mem., 808 F.2d 834, 19 BRBS 58 (CRT)(4th Cir. 1986). See p. 2-11.

The Board reverses administrative law judge's finding that claimant's injury did not occur in the course of his employment. The administrative law judge found that claimant's use of the work equipment he was injured on was unauthorized and therefore concluded that claimant was not acting in the course of his employment when injured. The Section 20(a) presumption applies to the issue of whether an injury arises in the course of employment. The fact that an activity is not authorized is not sufficient alone to sever the connection between the injury and the employment. Employer did not present any evidence that claimant's work activity at the time of his injury was unrelated to his employment. Since there was no evidence of record directly controverting the presumption, claimant's injury arose in the course of his employment as a matter of law. *Willis v. Titan Contractors, Inc.,* 20 BRBS 11 (1987).

The Board affirmed the administrative law judge's determination that claimant's injury did not arise in the course of employment where claimant severed the employment nexus by embarking on a personal mission. The Board's prior holding that the trip-payment exception to the coming and going rule would apply if claimant was returning from work when the accident occurred constitutes the law of the case. The Board, therefore, rejected claimant's argument that even if he was not returning from work when the accident occurred, other factors establish that the accident occurred in the course of his employment. *Oliver v. Murray's Steaks,* 21 BRBS 348 (1988).

The Board affirms the administrative law judge's finding that claimant's injury arose in the course of employment based on: 1) his application of the "zone of special danger" theory in a D.C. Act Case; 2) his determination that: where entertainment is part of an employee's duties, it is necessary to provide such duties in private homes, and there is an evening curfew, it is reasonably foreseeable that an employee could suffer an injury in a private home after his employment duties were completed; and 3) his conclusion that as claimant's presence in the house was not for purely personal reasons, he had not severed the employment nexus. *Forlong v. American Security & Trust Co.,* 21 BRBS 155 (1988).

The Board affirmed the administrative law judge's finding that the injury to claimant, an off-duty bartender injured during a fight which began on employer's premises, did not arise out of or in the course of his employment, and that there was substantial evidence to rebut the Section 20(a) presumption. The Board noted that although claimant may have initially responded to employer's request to protect patrons and property in the event of an altercation, so that he was theoretically on duty, claimant acted voluntarily and beyond the scope of that request by going across the street to assist a patron who had run out of the bar with a two-by-four. The Board also affirmed the administrative law judge's finding that claimant was thoroughly disconnected from employer's service when he was injured, and that therefore the obligations or conditions of employment did not create any zone of special danger out of which the injury arose. *McNamara v. Mac's Pipe and Drum, Inc.,* 21 BRBS 111 (1988).

Where claimant, an employee covered under the Non Appropriated Funds Instrumentalities Act, was injured on a defense base prior to her arrival at employer's facility, the administrative law judge's finding that the "coming and going" rule applied and that she was not injured in the course of her employment was affirmed. The zone of special danger rule is limited to cases arising under the Defense Base Act and the District of Columbia Workmen's Compensation Act, and the finding that the circumstances of employment did not create a zone of special danger was rational and supported by substantial evidence. *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base,* 22 BRBS 372 (1989).

Claimant's participation in the murder of her spouse effectively severed any causal relationship which may have existed between the conditions created by his job and his death. Also, the policy that a wrongdoer should not be allowed to benefit from his or her own wrong is applicable in this case arising under the Defense Base Act, where a claimant, whom the administrative law judge rationally found had participated in the criminal activity leading to her husband's murder, attempted to secure death benefits arising from his death. *Kirkland v. Air America, Inc.,* 23 BRBS 348 (1990), *aff'd mem. sub nom. Kirkland v. Director,* OWCP, 925 F.2d 489 (D.C. Cir. 1991).

For an injury to arise in the course of employment, it must have occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. Injuries sustained on the way to and from work are generally not within the scope of employment. The Board sets forth the exceptions to the "coming and going" rule. In this case, where is was undisputed that claimant was injured in a parking lot on an air force base, the Board held that the parking lot was not part of employer's premises and that the injury is not compensable. Although employer is located on the base, it is a separate entity operating on nonappropriated funds. Employer thus lacks any control over or responsibility for the condition of the area surrounding the building it occupies, including the parking lot. In addition, the injury did not occur during the "time boundaries" of claimant's employment. Finally, the administrative law judge erred by relying on the "zone of special danger" doctrine, as it is inapplicable to the Nonappropriated Funds Instrumentalities Act. *Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch,* 23 BRBS 175 (1990).

In this case arising under the Defense Base Act, claimant, while working for employer on the Johnston Atoll, sustained an injury during an altercation at a social club following his work shift. The administrative law judge found, based on claimant's credible testimony, that the conditions of claimant's employment on the atoll, *i.e.*, the isolation of the atoll coupled with the limited availability of recreational activities and the accessibility of alcohol, created a "zone of special danger" out of which claimant's injury arose. Specifically, the administrative law judge found that employment conditions were such that it was clearly foreseeable by both the military authority and employer that "risky horseplay" or scuffles such as the one which injured claimant would occur from time to time. The Board held that the administrative law judge properly applied the "zone of special danger" doctrine and that his findings of fact and conclusions of law were rational, supported by substantial evidence and in accordance with the appropriate standards. Accordingly, the Board affirmed the finding that claimant sustained a compensable injury under the Act. The Board factually distinguished other "zone of special danger" cases, *i.e., McNamara*, 21 BRBS 111; *Gillespie*, 21 BRBS 56, and *Kirkland*, 23 BRBS 348. *Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002), *aff'd sub nom. Kalama Services, Inc. v. Director, OWCP,* 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied,* 125 S.Ct. 36 (2004).

The Ninth Circuit affirmed the Board's decision that the administrative law judge correctly applied the "zone of special danger" doctrine to find that claimant sustained a compensable injury under the Defense Base Act. Where claimant was injured at a social club to which he went after work on Johnston Atoll, a remote island that offers few recreational opportunities, an injury during horseplay of the type that occurred here is a foreseeable incident of employment. *Kalama Services, Inc. v. Director, OWCP,* 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *aff'g Ilaszczat v. Kalama Services,* 36 BRBS 78 (2002), *cert. denied,* 543 U.S. 809 (2004).

In this DBA case, claimant, while working as a contractor in Afghanistan, sustained injuries as a result of passively resisting MPs. The Board held that the administrative law judge's denial of benefits, based on his findings that claimant was at fault, or that the injury-causing incident did not directly involve employer or its personnel, was erroneous. Consideration of fault is directly contrary to the plain language of Section 4(b), as well as its longstanding, underlying principles. Moreover, the Board held that an employer's direct involvement in the injury-causing incident is not necessary for any injury to fall within the zone of special danger, since the conditions of claimant's employment placed him in a foreign setting where he was exposed to dangerous conditions. Specifically, the Board observed that the limits of the zone of special danger are defined by whether the injury occurred within the zone created by the obligations and conditions of that employment. The Board conceded that claimant was at fault in causing the altercation, but concluded that once fault is eliminated, all that remains is an injury on a base in Afghanistan that is rooted in the conditions and obligations of claimant's employment. Consequently, the Board reversed the administrative law judge's conclusion that claimant's behavior removed him from the zone of special danger created by his employment, held that the injury was work-related, and therefore remanded the case for consideration as to the merits of claimant's claim. *N.R. v. Halliburton Services,* BRBS (2008) (McGranery, J., dissenting).

The Board reverses finding that injury incurred in after-hours softball game occurred in the course of employment. Even if the purpose of an activity is not related to employment, social or athletic activity is within the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs and practices of the particular employment, the activity is an inherent part of the conditions of that employment. In cases of voluntary social or recreational activity, the Board set forth six factors that are generally relevant to a determination as to whether an injury during a voluntary social or recreational activity arose in the course of employment, but notes that no single factor is determinative and that the enumerated factors are not exclusive. In this case, the Board reversed the administrative law judge's findings of employer sponsorship, employer encouragement, and tangible benefit to employer, as not supported by substantial evidence. In so concluding, the Board noted that the administrative law judge was correct in applying the Section 20(a) presumption. Finally, the Board held that the administrative law judge's finding that the injury occurred on employer's premises is not consistent with prior Board case law arising under the Nonappropriated Fund Instrumentalities Act. Assuming, *arguendo,* that the injury occurred on employer's premises, the Board found that, under the facts of this case, this factor alone could not support a finding that claimant's injury occurred in the course of employment. *Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992).

After extensive consideration of the Larson treatise, the Board affirmed the administrative law judge's conclusion that claimant's injury, sustained while participating in a recreational activity during his lunch hour, occurred in the course of his employment. The Board specifically held that claimant's recreational activity of playing ping-pong on employer's premises during his lunch beak, occurred as a regular incident of his employment. The administrative law judge found that the credible evidence establishes that employees regularly engaged in this activity on employer's premises within the period of employment, with employer's acquiescence (*i.e*., employer provided the equipment and site for the activity). Employer need not derive a benefit from the activity for it to arise in the course of employment under the applicable test for coverage of recreational activities on employer's premises. *Sheerer v. Bath Iron Works Corp.*, 35 BRBS 45 (2001).

In a case where claimant satisfied the time and space boundaries of employment, the Board affirmed the administrative law judge's finding that claimant, a forklift driver, was acting within the course of his employment when he paused momentarily on the way to his forklift to help an off-duty co-worker start his car. Claimant was burned when the gasoline ignited, and the administrative law judge found that this injury occurred while claimant was indirectly advancing the interests of his employer by maintaining an amiable relationship with a known hostile employee. The Board also found that this activity would have been considered in the course of employment had the administrative law judge used an alternate test which considers the degree to which claimant deviated from his duties to aid a co-employee in some matter that is entirely personal to the co-employee. Under this alternate test, the Board held that claimant's deviation from his job responsibilities was insubstantial, as the car was in the direct path between the locker room and the forklift and the aid should have taken just a few seconds. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1996).

The Fourth Circuit held that even though the parking lot where claimant was injured on her way to work was not owned by employer, the lot was part of employer's "premises" for purposes of the Act's course of employment requirement as the parking lot was designated for the exclusive use of employees, employees were prohibited from parking elsewhere unless the lot was full, employer enforced the parking rules, and employer directed employees to do certain upkeep on the lot, such as trash and ice removal (but did not perform major structural repairs). As the injury occurred on employer's premises, the "coming and going" rule is inapplicable. The holding was specifically limited -- it does not suggest worker's compensation coverage for all injuries suffered in parking lots used by employees. *Shivers v. Navy Exchange,* 144 F.3d 322, 32 BRBS 99(CRT) (4th Cir. 1998).

Where claimant injured herself on an ice-covered sidewalk adjacent to the employee-designated entrance door of employer's facility, the Board distinguished *Harris*, 23 BRBS 175 (1990), and *Cantrell*, 22 BRBS 372 (1989), and held that since employer exercised control over the area where claimant was injured, claimant's injury arose in the course of her employment. Specifically, employer designated the parking lot its employees were to use, and the administrative law judge credited testimony that employer maintained the sidewalk. In so holding, the Board applied the rationale of the Fourth Circuit in *Shivers v. Navy Exchange*, 144 F.3d 322, 32 BRBS 99(CRT)(4th Cir. 1998). *Trimble v. Army & Air Force Exchange Service*, 32 BRBS 239 (1998).

The Board holds, based on the facts of this case, that claimant's injury occurred on employer's "premises" and thus, reverses the administrative law judge's denial of benefits on the ground that claimant's injury on her way to work did not occur in the course of her employment. Specifically, the Board held that although employer may not be responsible for the maintenance of the area surrounding its building as there is no evidence of record on this issue either way, it is nevertheless responsible for the deteriorated condition of that area, as moving trucks used by employer to relocate its operation caused the destruction of the sidewalk and the ruts in the surrounding grass area where claimant's injury occurred. The instant case involves an affirmative act on the part of employer in operating its business, which created a risk of employment not shared with the public. This establishes that employer exercised sufficient control over the area where claimant's injury occurred so that the area in question is to be considered part of employer's premises. Consequently, the coming and going rule is not applicable to the instant case. *Sharib v. Navy Exchange Service,* 32 BRBS 281 (1998).

The Board affirmed the administrative law judge's determination that claimant's injury did not occur within the course of his employment. The Board held that, although claimant was injured during the time and space boundaries of his employment because he was injured on a vessel under construction on employer's premises during the work day, his injury happened while he was engaged in an activity which did not have a purpose related to his employment. Specifically, claimant was injured when he was on a detour to a remote area of the ship for the purpose of smoking a marijuana cigarette, and the Board agreed with the administrative law judge's conclusion that this was a personal frolic which severed the employment nexus. Although there are personal activities which occur during the course of the workday that do not sever the nexus, the Board could not equate claimant's activities here with those types of activities, as employer could not have expected its employee to venture into a closed area of the ship to commit a crime. Therefore, the Board affirmed the administrative law judge's denial of benefits. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999).

The Board affirmed the administrative law judge's finding that claimant's injury, sustained in a van pool accident on I-95 on the way home from work, occurred in the course of his employment. Under the "employer's conveyance" exception to the "coming and going rule," employer is liable for injuries sustained in a vehicle under the control of employer, as the risks of employment are extended under such circumstances. In this case, substantial evidence supports the finding that the van pool is under employer's control: it has payroll deductions for the participants, sets the rates for participation, screens drivers, leases or owns the vans, and provides the insurance, maintenance and repair for the vans. The program also benefits employer. The facts that employer is not contractually obligated to provide the program and that the employees pay to participate do not detract from the applicability of the "employer's conveyance" rule. The Board notes that employer did not raise any coverage issues in this case, *i.e.,* situs. *Broderick v. Electric Boat Corp.*, 35 BRBS 33 (2001).